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No. 99-1212

IN THE
Supreme Court of the United States

LYNDON H. LAROUCHE, JR., *et al.*,
Appellants,

v.

DONALD L. FOWLER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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MOTION TO AFFIRM

The DNC, its former chair and the state parties move to affirm on the ground that the questions presented are so misleading[1] and so insubstantial as not to need further

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[1] In this statutory construction case, the two questions confusingly conflate separate national and state parties into one geographically-undefined non-appellee "Democratic Party", omit the statute and its geographic limits confirming the non-filing obligation of a *national* party and omit the Section 5 exemption in Department of Justice regulations for *state* parties in covered jurisdiction, acting under the authority of the *national* party (28 C.F.R. § 51.7(b) (1996)). More generally, the two questions misstate critical facts. All votes cast were counted; thus, the first question's rhetoric about "nullify votes previously cast" is not factually correct. Moreover, the second question assumes Democratic Party "obligations" under Section 5, which the

argument. The dismissal below is consistent with the geographical limits of the statute; dismissal is also consistent with the dispositive Department of Justice regulations exempting state party preclearance for acts under the authority of the *national* party (rather than that of a covered jurisdiction) and with statements in all five written opinions in the recent case of *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) about the First Amendment protection for *national* party rules.[2]

COUNTERSTATEMENT

Mr. LaRouche and his supporters contest two out of 4,320 delegates to the 1996 Democratic National Convention on behalf of a white male found by then-national party chair Fowler not to be a bona fide Democrat on account of "beliefs which are explicitly racist and anti-Semitic."

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geographic limits of the statute do not impose on the *national* party and which the authoritative regulations do not impose on *state* parties acting under the authority of the *national* party. The constitutional issue posed by the second question would not ordinarily be decided, where the statute on its face does not apply to the national party and where the regulations, entitled to substantial deference, exempt acts of state parties under the authority of the national party.

[2] The rulings of the Court of Appeals on constitutional and non-Section 5 statutory claims (although reprinted in LaRouche App. at 17a-61a) are not before this Court on this appeal from the three-judge court's November 1, 1999 Order. *See* Jurisdictional Statement Appendix ("J.S. App.") 62a; *accord Morse v. Republican Party of Virginia*, 517 U.S. 186, 192 n. 4 (1996). For example, LaRouche's frivolous intimidation claim under 42 U.S.C. §1971(b), J.S. 11, is not before this Court and was properly dismissed by the single-judge District Court and affirmed by the Court of Appeals. J.S. App. 61a (dismissing "plaintiffs' claims under all other statutory and constitutional provisions").

By letter dated January 5, 1996, Donald L. Fowler, then National Chair of the Democratic National Committee, informed all Democratic Party State chairs as follows:

> Rule 11(K) of the Delegate Selection Rules for the 1996 Democratic National Convention adopted by the Democratic National Committee on March 12, 1994, provides that, for purposes of those Rules, a qualified candidate for the nomination of the Democratic Party for President—
>
> > must be registered to vote, must be a declared Democrat, and must, as determined by the Chairman of the Democratic National Committee, have established a bona fide record of public service, accomplishment, public writings and/or public statements affirmatively demonstrating that he or she has the interests, welfare and success of the Democratic Party of the United States at heart and will participate in the Convention in good faith.
>
> Under Article VI of the Call to the Democratic National Convention, adopted by the Democratic National Committee on January 21, 1995, the term "presidential candidate" means:
>
> > . . . any person who, as determined by the National Chairperson of the Democratic National Committee, has accrued delegates in the nominating process and plans to seek the nomination, has established substantial support for his or her nomination as the Democratic candidate for the office of the President of the United States, is a bona fide Democrat whose record of public service, accomplishment, public writings and/or public statements affirmatively demonstrates that he or she is faithful to the interests, welfare and success of the Democratic Party of the United States, and will participate in the Convention in good faith.

This is to notify you that, under the authority granted to me by the Delegate Selection Rules and the Call, I have determined that Lyndon LaRouche is not a bona fide Democrat and does not possess a record affirmatively demonstrating that he is faithful to, or has at heart, the interests, welfare and success of the Democratic Party of the United States. This determination is based on Mr. LaRouche's expressed political beliefs, including beliefs which are explicitly racist and anti-Semitic, and otherwise utterly contrary to the fundamental beliefs, values and tenets of the Democratic Party and is also based on his past activities including exploitation of and defrauding contributors and voters.

Accordingly, Mr. LaRouche is not to be considered a qualified candidate for nomination of the Democratic Party for President under the Delegate Section Rules and is not to be considered a "presidential candidate" within the meaning of Article VI of the Call. Therefore, state parties, in the implementation of their delegate selection plans, should disregard any votes that might be cast for Mr. LaRouche, should not allocate delegate positions to Mr. LaRouche and should not recognize the selection of delegates pledged to him at any stage of the Delegate Selection Process.

Further, Mr. LaRouche will not be entitled to have his name placed in nomination for the office of President at the 1996 Democratic National Convention. No certificate of a delegate pledged to Mr. LaRouche will be accepted by the Secretary of the DNC and no such delegate shall be placed on the Temporary Roll of the Convention. The National Chair will, if necessary, and upon the proper filing of a challenge, recommend to the Credentials Committee of the 1996 Democratic National Convention that the Committee resolve that any such delegate not be seated at the Convention.

> If you have any questions about the implementation of this notice, please do not hesitate to contact me or to contact the DNC's Rules and Bylaws Committee at (202) 863-7191.

(J.S. App. 74a-76a).[3]

Rule 11(K) and former Chair Fowler's letter were issued pursuant to the authority duly granted to the DNC and its chair by the Charter and Bylaws of the Democratic Party. The Court of Appeals so found. J.S. App. 60a, and also found that the January 5, 1996 letter did not preclude LaRouche from running for President or from appearing on any presidential primary ballot. J.S. App. 20a. As conceded in the Jurisdictional Statement ("J.S.") at p. 6, LaRouche did appear on primary ballots in twenty-six states, receiving cumulatively 597,853 votes. The effect of the national chair's letter was to preclude one 1996 national convention delegate from Louisiana (J.S. 7) and one delegate from Virginia (J.S. at 8) that would otherwise be awarded to LaRouche based on the results of the Louisiana primary and Virginia caucus. The processes for filling such delegate positions are entirely organized, financed and run by the state Democratic party organization. Indeed LaRouche concedes that with respect to Arizona, J.S. 8 ("Democratic Party financed"), but otherwise grossly misstates the facts. J.S. at 2.[4]

Arizona. Inability of the Arizona party to participate in a 1996 state-run primary had nothing to do with Rule 11(K) of the Delegate Selection Rules nor Chair Fowler's letter. It

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[3] J.S. App. 74a omits several phrases and misstates words in paragraph two. These are corrected in text here.

[4] The Arizona facts are from the Court of Appeals. J.S. App. 20a. The Louisiana, Texas and Virginia facts (as contrasted to argumentative characterizations of those facts) are essentially undisputed, but restated for clarity and emphasis.

involved the so-called "window rule" and the attempt by the State of Arizona (found unconstitutional by its Attorney General) to mandate a state-run primary on February 27, 1996, despite Democratic National Committee 1996 Delegate Selection Rule 10A prohibiting Arizona Democrats from participating in a primary election before Tuesday, March 5, 1996. LaRouche litigated and lost in the Arizona state courts a challenge to compel the Arizona Democratic party to participate in a public primary outside the DNC permitted "window" that preserves the primacy of Iowa and New Hampshire in the delegate selection process and attempts to prevent front-loading.

For Section 5 purposes, the 1996 party event was not a "change" from the 1992 party event—and in the court below, LaRouche did not allege that it was a "change" from 1992. Section 5 applies only to "changes"; non-changes do not need preclearance. *See* 28 C.F.R. § 51.11 (1996).

In any event, this LaRouche argument was not presented to the three-judge court below in his preclearance count, his memoranda in opposition to the motions to dismiss nor in oral argument. It is not properly before this Court now. The two questions presented in the Jurisdictional Statement do not even purport to discuss either the date or the sponsor of the Arizona party event. Moreover, this and other local disputes arising out of unpleaded District of Columbia personal jurisdiction and venue[5] over Arizona (and other

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[5] Affirmance of the judgment of dismissal below would have the appropriately limited precedential value and avoid this Court's imprimatur on the procedural oddity of Arizona, Louisiana, Texas, and Virginia parties defending this action in the District of Columbia on unpleaded allegations of personal jurisdiction and venue. The Complaint alleges simply that each state party received in its home state—and acted upon in its home state—a letter sent by the DNC chair *from* Washington, D.C. Such has never been sufficient to satisfy constitutional minimum contacts by the recipient with the forum *from which* the letter was sent. *See*

state parties), is peculiarly inappropriate for this Court's plenary review.

Louisiana. LaRouche now claims, for the first time on appeal, that "the DNC's coercion resulted in violation of the [Louisiana] state law requiring that delegates be apportioned according to the votes cast in the primary election." J.S. at 14. But this Court has already held in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981) and in *Cousins v. Wigoda*, 419 U.S. 477 (1975) that the Democratic National Convention has the constitutional right to seat delegates in accordance with its own rules despite contrary state law.

The selection of delegates from Louisiana's 6th Congressional District to the 1996 National Convention was a two-step process. J.S. 7. First, Democratic voters in the district voted in the state's presidential preference primary for one of the party's presidential candidates. The results of the primary determined the number of national convention delegate and alternate positions that could be allocated among the presidential candidates. In the second step, the state party held congressional district caucuses to fill the positions allocated to each presidential candidate by electing national convention delegates and alternates from that district pledged to each such candidate. According to the 1996

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). *Accord, GTE New Media Services, Inc. v. BellSouth Corp.*, 2000 U.S. App. LEXIS 257 (D.C. Cir. Jan. 11, 2000) (telephone calls received *from* the District of Columbia do not permit jurisdiction over recipient). In light of this authority, the Court would likely have to dismiss the case against all state party defendants if it granted plenary review. Venue was also defectively pleaded, inasmuch as 28 U.S.C. § 1391(b) (1994), relied on by the District Court (J.S. App. 10a), was not pleaded. Paragraph 2 of the Complaint pleaded venue only under 42 U.S.C. §1973c—which is applicable only when a covered jurisdiction is a plaintiff—and 28 U.S.C. § 2284—which is not a venue statute.

National Delegate Selection Rules, in order to receive delegates and alternates, a presidential candidate must, in addition to certain other criteria, have received at least 15% of the vote in the district (Rule 12(B)) and have been a bona fide Democrat (Rule 11(K)).

The congressional district caucuses held to fill delegate positions were organized, financed and run entirely by the Louisiana Democratic Party without any involvement, assistance or support from the State of Louisiana or any other governmental entity.

Louisiana's presidential preference primary was held on March 12, 1996, and LaRouche appeared on the ballot. Based on the results of the primary, LaRouche would have been allocated under Rule 12(B) one delegate position in the 6th Congressional District, but this was prohibited by Rule 11(K) and the national party's determination in former chair Fowler's January 5, 1996 letter. Based on this national party determination, the Louisiana Democratic Party did not allocate that one delegate position to LaRouche in the 6th Congressional District caucus held on March 30, 1996. LaRouche's allegation that "Louisiana Democrats refused to hold a caucus" (J.S. 3) is overstated.

The Louisiana Democratic Party's compliance with Delegate Selection Rule 11(K), the Call and the January 5, 1996 DNC Letter was required by the national party.

Texas. Similar to Louisiana, the 1996 National Convention delegate selection process was a two-stage process. Step one was a presidential primary in which LaRouche appeared on the ballot; several of the appellants cast votes for him. In the second stage, Texas held caucuses by state senate district to fill the national convention delegate seats. Its district caucuses were organized, financed and run solely by the state party without involvement, assistance or support of the state of Texas or its governmental subunits.

Pursuant to 1996 National Delegate Selection Rule 11(K), and DNC chair Fowler's letter of January 5, 1996, the Texas party was prohibited by the national party and its chair from "recogniz[ing] the selection of delegates pledged to him at any stage of the Delegate Selection Process." J.S. App. 75a. The Texas party's compliance with National Rule 11(K) and the national party chair's January 5, 1996 letter was required by the DNC.

LaRouche alleges that "Texas Democrats stripped delegates of their elected party positions . . . ." J.S. 3. This is not factually correct. Ineligible candidates under either National Rule 12 (failure to receive 15% of the district vote in the primary) or National Rule 11(K) (failure to be a bona fide Democrat) had *no* entitlement to any delegate. A purported delegate supporting an ineligible candidate was not permitted by national party rules.

Virginia. In Virginia, the state party used a convention/caucus system to select national convention delegates to the 1996 Democratic National Convention. J.S. 7. The party caucus was organized, financed and run by the party without involvement, assistance or support from the Commonwealth of Virginia. LaRouche concedes that the Virginia Democratic Party precleared *its* delegate selection plan, J.S. 8, including Virginia Rule 20.1 captioned "Priority of Calls" ("where any procedures . . . are inconsistent with the call to a national convention . . . , the call of the National Committee shall prevail").[6] The priority of Article VI of the Call, invoked by chair Fowler's letter (J.S. App. 74a), is thus precleared in Virginia when in conflict with Virginia procedures, but LaRouche contends that the state party must

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[6] Virginia Democratic Parties' Opposition to Preliminary Injunction, exhibit to Declaration of W. Raymond Colley, filed August 9, 1996 and expressly incorporated by reference in their motion to dismiss filed November 2, 1998.

also preclear National Rule 11(K) and DNC chair Fowler's letter.

Thus, unlike in *Morse*, involving a *state* Republican convention in Virginia that selected a U.S. Senate candidate from Virginia, the Virginia Democratic Party concededly precleared *its* rules and LaRouche does not challenge those. Instead, LaRouche challenges *national* party rules for 1996 Democratic National Convention delegates for whom there was no automatic placement on a Virginia general election ballot. *Compare Morse*, 517 U.S. at 201-202. Acts of the state party enforcing *national* rules and the *national* chair's application against LaRouche are under the authority of the *national* party, as made explicit in chair Fowler's letter. J.S. App. 74a-76a.

Moreover under the Virginia *state* party plan that was concededly precleared by the U.S. Department of Justice, LaRouche is ineligible to be a Democratic candidate in any event. The precleared Virginia Democratic Party Plan provides, in pertinent part:

> Section 2.2 Participation
>
> Every person who participates as a *candidate* or voter in a Democratic primary, convention or caucus must be qualified to vote in the next ensuing general election or special election. (emphasis supplied)[7]

As a convicted felon, Mr. LaRouche cannot be a registered voter under Article II, Section 1 of the Virginia Constitution and was not a registered voter in Virginia.[8] Under precleared state party rules, he was ineligible to be a party candidate in the Virginia caucus process. Thus the Virginia Democratic Party had unique precleared grounds, in addition to Rule

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[7] *Id.*

[8] *Id.*, exhibit to Susan McCleary Affidavit, ¶¶ 4-8, filed August 9, 1996.

11(K) and former chair Fowler's directive, that prevented Mr. LaRouche, a Virginia resident, from receiving a national convention delegate from Virginia. These grounds were briefed[9] but not reached by the court below.

ARGUMENT

The appellants' arguments are insubstantial. The plain language of the statute makes clear that the DNC is not subject to the preclearance requirement. And both the controlling regulatory language and settled First Amendment principles establish that the state parties are not subject to the Act for the national party acts presented here. For these reasons, this case does not present an appropriate vehicle with which to address any issues left unresolved in *Morse*. Unlike the usual proceeding under the Act, which involves state- (or state party-) initiated changes in facially neutral voting procedures or practices, this case concerns a directive from the *national* party involving *party philosophy and the identity of the party's candidates*. It appears that each of the opinions in *Morse* would recognize that a national party rule of this sort is entitled to the greatest degree of constitutional protection. Plenary review of this case accordingly is not warranted and the district court's decision should be summarily affirmed.

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE GEOGRAPHIC LIMITS OF SECTION 5 OF THE VOTING RIGHTS ACT DO NOT EXTEND TO A *NATIONAL* PARTY, WHICH IS NOT A SUBUNIT FOUND WHOLLY WITHIN A COVERED JURISDICTION.

Section 5, unlike other provisions of the Voting Rights Act, has strict geographic limits. 42 U.S.C. § 1973b(b).[10] In a

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[9] *See* notes 6 - 8, *supra*.

[10] This controlling and dispositive statute is omitted from J.S. App., which reprints only § 1973c. Generally, states and subunits thereof are covered if: (1) they used literacy or other voter

statutory construction case, the legal analysis begins, and appropriately ends, with the plain meaning of the words of the statute. These plain words are dispositive with respect to the DNC and its national chair.

The district court concluded that "application of the preclearance requirement to a national political party is not consistent with the geographical scheme of the statute." J.S. App. 9a. This conclusion, as a matter of statutory interpretation, is unquestionably correct.

Section 5 currently applies to nine states and parts of seven others. These "covered jurisdictions" are authoritatively listed in 28 C.F.R. Part 51 Appendix (1996).[11] Neither the DNC nor its national chair is *in* a "covered jurisdiction." The DNC is in Washington, D.C., which is not a covered jurisdiction. The 1996 Democratic National Convention was in Chicago, Illinois, which is also not a covered jurisdiction. Because not found within a covered jurisdiction, the DNC

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registration tests on November 1, 1964 and less than 50 percent of the voting age population were registered or voted in the 1964 Presidential election; (2) they used a literacy or other voter registration test on November 1, 1968, and less than 50 percent of the voting age population were registered or voted in the 1968 Presidential election; or (3) more than 5 percent of the voting age population were members of a single language minority group on November 1, 1972, the jurisdiction conducted registration and voting only in English, and less than 50 percent of its voting age population were registered or voted in the 1972 Presidential election. *See* 42 U.S.C. § 1973b(b).

[11] These are: Alabama, Alaska, Arizona, California (four counties), Florida (five counties), Georgia, Louisiana, Michigan (parts of two counties), Mississippi, New Hampshire (parts of seven counties), New York (three counties that comprise Manhattan, Brooklyn, and the Bronx), North Carolina (40 counties), South Carolina, South Dakota (two counties), Texas, and Virginia. *Id.*

and its national chair do not meet the statutory tests of 42 U.S.C. § 1973b(b).[12]

Moreover, Congress expressly stripped any court of jurisdiction to add to the list of covered jurisdictions. 42 U.S.C. § 1973b(b) ("shall not be reviewable in any court"). Such a Congressional limitation reinforces Congress' choice of geographic limits and its intent that entities outside the covered jurisdictions are not subject to Section 5.

Thus, the district court correctly determined that former chair Fowler and the DNC were not subject to Section 5. Its reasoning, by analogy to *Lopez v. Monterey County*, 119 S. Ct. 693 (1999), is compelling:

> The DNC is not a covered jurisdiction. But regardless of whether the state parties are covered, the DNC need not preclear changes for the same reason that California does not need to preclear changes, i.e., neither California nor the DNC are covered jurisdictions, although their political subunits may be. *Morse* may stand for the proposition that a state political party can at times act as a delegatee of power from its resident state, but it would be inconsistent with *Lopez* to say that a national political party can be delegatee of power from any of its covered political subunits.

J.S. App. 8a. Precisely so. Because this Court decided *Lopez* as recently as last term, the questions presented as to the DNC and its national chair are so insubstantial as not to need further argument.

There is no need to go beyond the plain words and geographic limits of the statute to affirm the judgment of

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[12] This is in sharp contrast to the Republican Party of Virginia in *Morse*, which is *in* a covered jurisdiction and therefore some, but not all, of its acts require preclearance. *See* 28 C.F.R. §51.7; *accord*, *Morse*, *supra*.

dismissal as to the national party and its former national chair. However, if the legislative history were to be consulted, the Court of Appeals, in its thorough decision earlier in this case, correctly noted:

> But nothing in the historical context supports a concern that a covered jurisdiction would try to achieve this end by delegating authority to a *national* party, or that a national party would attempt to impose racially discriminatory rules on a covered jurisdiction. To the contrary, the fact that Congress restricted the application of the Voting Rights Act to specified geographic jurisdictions indicates that it did not have the same concerns regarding actions taken by other jurisdictions.

J.S. App. 38a (emphasis in original).

II. UNLIKE THE ACTS OF THE COVERED COUNTY IN *LOPEZ V. MONTEREY COUNTY*, 119 S. CT. 693 (1999), ONLY "CERTAIN ACTIVITIES OF POLITICAL PARTIES" NEED PRECLEARANCE AND DEPARTMENT OF JUSTICE REGULATIONS, 28 C.F.R. § 51.7 (1996), EXEMPT ACTS "UNDER THE AUTHORITY OF" THE *NATIONAL* PARTY, THUS AVOIDING UNNECESSARY CONSTITUTIONAL ISSUES.

Unlike the covered county in *Lopez v. Monterey County, California*, 119 S. Ct. 693 (1999), that must preclear *all* changes affecting voting within the scope of Section 5, state political parties in a covered jurisdiction "are covered under Section 5 only in certain limited circumstances." *Morse*, 517 U.S. at 225 (Stevens, J.). The Department of Justice regulations are explicit on this limited scope. By regulation, a state party must preclear only "certain activities." 28 C.F.R. § 51.7 (1996). Moreover, the (b) clause of the regulations specifically exempts state political parties from preclearing party acts taken under authority of the national party.

This regulation, unchanged since its adoption in January 1981, 46 Fed. Reg. 871 (Jan. 5, 1981), states as follows:

> § 51.7 Political parties.
>
> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement:
>
> (a) If the change relates to a public electoral function of the party and
>
> (b) If the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5.
>
> For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

J.S. App. 70a.

The regulation sets forth two bright-line tests. Both must be met before preclearance of a political party's rule change is required: (a) the change must relate to "a public electoral function of the party" and (b) *the party must be "acting under authority explicitly or implicitly granted by a covered jurisdiction.*" (emphasis added).

When the DNC promulgated on March 12, 1994 Rule 11(K) and all its other Delegate Selection Rules for the 1996 Democratic National Convention, it was acting under its own authority in its Charter and Bylaws. J.S. App. 60a. Rule 11(K) applies to Democrats in all fifty states, the District of

Columbia, Puerto Rico, Guam and to Democrats abroad. It is not limited to the nine states and parts of seven others covered by Section 5. 28 C.F.R. § 51 App. Thus, the DNC was not acting under authority of a covered jurisdiction, within the meaning of 28 C.F.R. § 51.7(b), when it adopted Rule 11(K).

Similarly, Chair Fowler of the DNC was not acting under authority of a covered jurisdiction when he wrote his letter of January 5, 1996. This is self-evident from his DNC letterhead as DNC Chair and from the text of his letter referring explicitly to "under the authority granted to me by the Delegate Selection Rules and the Call." J.S. App. 74a; *accord*, J.S. App. 60a. The letterhead and text make plain that the authority is that of the DNC, not that of any of the fifty states, much less that of the few Section 5 jurisdictions.

The conclusion that the state parties were acting under the authority of the DNC—and *not* under the authority of a state—is confirmed by *Morse*. Justice Stevens' lead opinion in *Morse* explained that state "parties 'act under authority of' [a state] when they decide who will appear on the general election ballot." 517 U.S. at 197. See *id* at 195 ("the [state] party exercised delegated state power when it certified its nominee for automatic placement on [the state's] general election ballot"); *id.* at 198 (state party "is thus delegated the power to determine the field of candidates from which the voters must choose"). But as we explain above (at pages 7-11), the elections here did not lead to placement of nominees' names on the state general election ballot; instead, they involved the selection of delegates to a national party convention, an undertaking that did not involve the states at all. The consideration that was regarded as crucial by the lead opinion in *Morse* therefore is wholly absent from this case.

Indeed, that point is made explicit by Justice Stevens' discussion of the summary affirmance in *Williams v.*

Democratic Party of Georgia, 409 U.S. 809 (1972), which settled a state party's *non*-obligation under Section 5 to preclear a *national* Democratic Party rule for delegate selection to a national convention. Justice Stevens explained that

> *Williams* did not concern the selection of nominees for state elective office, but rather a political party's compliance with a rule promulgated by the Democratic National Party governing the selection of delegates to its national convention. According to the District Court's interpretation of Georgia law, the State exercised no control over, and played no part in, the state Party's selection of delegates to the Democratic National Convention. Because the [state] delegated no authority to the Party to choose the delegates, the Party did not act under the authority, implicit or explicit, of the [state.]

Morse, 519 U.S. at 201-202 (footnote omitted). Justice Stevens added that, "[u]nder the Attorney General's regulation that is now in effect, preclearance of the National Democratic Party's Rule change would not have been required if the District Court's interpretation of Georgia law was correct." *Id.* at 202 n.19. That conclusion is dispositive in this case, where the states also exercise no control over and play no part in the selection of delegate to the national convention, and where the state party's actions involved nothing more than "compliance with a rule promulgated by the Democratic National Party."[13]

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[13] Justice Stevens' conditional description of the 1972 summary affirmance in *Williams* (*i.e.*, "if the District Court's interpretation of Georgia law was correct") must be read in light of the Supreme Court's later decisions in *Cousins* and the *LaFollette* which made clear that no state had power to review or change DNC rules. Those decisions, as a matter of constitutional law, held broadly that *no* state could override national party rules "notwithstanding the state's views that a different process would be more appropriate." *LaRouche*, 152 F.3d at 997. Because national party

Because it is so clear that the state parties were acting under the authority of the DNC, there is no need for this Court to even reach the second issue under 28 C.F.R. § 51.7 (1996), that is, whether, in party-run selection of delegates, the (a) test of "a public electoral function of the party" has been met.

III. THE DISTRICT COURT CORRECTLY APPLIED THE FIRST AMENDMENT FREEDOM OF ASSOCIATION OF A *NATIONAL* PARTY, CONSISTENT WITH EACH OF THE FIVE WRITTEN OPINIONS IN *MORSE V. REPUBLICAN PARTY OF VIRGINIA*, 517 U.S. 186 (1996).

This Court in *Morse* issued five individual opinions on the applicability of Section 5 and 28 C.F.R. § 51.7 (1996) to a *state* party's enforcement of a *state* party rule requiring a filing fee for a *state* party convention in a covered jurisdiction. Even in that context, every Member of the Court noted the relevance of the First Amendment to the inquiry.

Justices Stevens and Ginsburg, in the lead opinion, "wholeheartedly agree[d] . . . that the right of association of members of a political party 'is a basic constitutional freedom' and that 'governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny.'" 519 U.S. at 228 (citation omitted). Three Justices, concurring in the judgment, cautioned similarly that only some activities of a state party nominating convention in a covered jurisdiction could be constitutionally subject to preclearance. 517 U.S. at 238-39 (Breyer, J., concurring) ("First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention are

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rules must be followed even in the presence of contrary state law after *Cousins* and *LaFollette*, a state's views on DNC rules are without legal effect, as a matter of law.

difficult ones").[14] Four Justices dissented on First Amendment grounds from the judgment of the court that a state or local political party *inside* a covered "state or political subdivision" is covered by § 5. 517 U.S. at 246-47 (Scalia, J.); *id* at 252 (Kennedy, J.); *id.* at 254 (Thomas, J.). Not a single Justice suggested that a *national* party rule must be precleared by the *state* party; and footnote 19 in the opinion by Justice Stevens says that preclearance is not required for a national party rule.

This Court's analysis of a *state* party's obligations in all five opinions in *Morse*, as well as the Department of Justice's exemption in the regulations for acts of state parties under national party authority, are made in the constitutional context of the First Amendment freedom of association of a national party. This freedom applies with the greatest imaginable force in this case, where the challenged party rule involves definition of the party's core political beliefs and directly determines the identity of the party's candidates. As the court below observed:

> Here, we have the state parties administering internal national party rules governing who, as a Democrat, can be a candidate for president. *This would appear to fall within the core associational rights of a political party*. . . . Indeed, Justice Breyer intimated in his opinion in *Morse* that party activities such as the adoption of resolutions or platforms regarding party philosophy and

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[14] Justice Breyer further noted "that the lower courts have applied § 5 only to a small subcategory of party rules." 517 U.S. at 239. None of those cases involved *national* party rules, but rather the Alabama *state* and *local* party rules (albeit for national delegate selection) in *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) and in *Hawthorne v. Baker*, 750 F. Supp. 1090, 1094-95 (M.D. Ala. 1990) (three-judge court), *vacated as moot*, 499 U.S. 933 (1991); and a county committee in *Fortune v. Kings County Democratic County Committee*, 598 F. Supp. 761 (E.D.N.Y. 1984) (three-judge court).

> rules governing internal operation "are very likely not subject to preclearance."

J.S. App. 14a-15a (emphasis added) (quoting *Morse*, 517 U.S. at 238 (opinion of Breyer, J.)). The rules at issue here are, if anything, even more fundamental to the party's identity that the examples given by Justice Breyer.

The relevant constitutional background, analyzed correctly by the District Court, is summarized below.

In *O'Brien v. Brown*, 409 U.S. 1 (1972), the Credentials Committee at the 1972 Democratic Convention had upheld a challenge to the California delegation based on their selection in a winner-take-all primary in violation of party rules. The Court of Appeals ruled that the Credentials Committee action was unconstitutional. This Court stayed that ruling, expressing its concern "in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates." 409 U.S. at 4. This Court held that the judiciary should not interfere in "relationships of great delicacy that are essentially political in nature. . . . The convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the 1972 Democratic Convention had unseated the Illinois delegation based on violations of party rules and seated a rival delegation. An Illinois court ordered the official delegation seated on the basis of state law. This Court overturned that action, ruling that the national party had the constitutional right to seat delegates in accordance with its own rules despite a contrary state law.

In *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), Wisconsin state law provided for a presidential primary open to Republicans and independents, and required delegates to vote in accordance

with the results of the primary. This violated a DNC delegate selection rule banning open primaries. The Wisconsin Supreme Court ordered that delegates be apportioned based on the open primary and that they be seated. This Court reversed, ruling that Wisconsin could not force the DNC to seat a delegation chosen in contravention of the party's rules because such a requirement would violate the party's associational rights protected by the First Amendment.

This Court reasoned that:

> And the freedom to associate for the "common advancement of political beliefs" *Kusper* v. *Pontikes*, *supra* at 56, necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.
>
> * * *
>
> The inclusion of persons unaffiliated with a political party may seriously distort its collective decisions--thus impairing the party's essential functions--and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles'.

450 U.S. at 122 (citation omitted). This Court was explicit that:

> A political party's choice among the various ways of determining the makeup of a State's delegation to the party's *national* convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. (emphasis supplied; footnotes omitted).

450 U.S. at 124. Footnote 25 re-emphasized that such a membership requirement "is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible."

450 U.S. at 123 n. 25 (emphasis added). The Court of Appeals, in this case, has already held that Rule 11(K) is constitutionally permissible, J.S. App. 61a, and stated that such "viewpoint discrimination" is the "*sine qua non* of a political party that it represent a particular political view." J.S. App. 56a. [15]

More generally, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), upheld the First Amendment rights of a state party against contrary state law because "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U.S. at 224. Similarly, in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), this Court struck down California restrictions on the organization and composition of official governing bodies of the state and local Democratic party as unconstitutional infringement of the party's First Amendment freedom of association. The Court held:

> Freedom of association means . . . also that a political party has a right to 'identify the people who constitute the association'.

489 U.S. at 224 (citations omitted). Indeed the controlling First Amendment right is that of the political party to choose a "standard bearer who best represents the party's ideologies and preferences." 489 U.S. at 224 (internal quotation marks

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[15] This Court squarely held in *LaFollette* and *Cousins* that the alleged "statutorily" impermissible (there, Wisconsin and Illinois state statutes) must yield to First Amendment freedom of association of the party in national delegate selection rules. LaRouche's extensive reliance on the White Primary cases is wholly misplaced because nothing in this appeal or in the challenged rule implicates Fourteenth or Fifteenth Amendment values.

and citation omitted); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

Circuit holdings about national party conventions are similar. *Duke v. Massey*, 87 F.3d 1226, 1232 (11th Cir. 1996) ("Duke does not have a right to associate with an 'unwilling partner', the Republican Party"); *Wymbs v. Republican State Executive Committee of Florida*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) ("Even if we thought a federal court could, consistent with Article III, define the constituency of the Florida Republican Party and decide how that constituency could best be represented at the national convention, we would be constrained by the Party's countervailing First Amendment rights of free speech and association.") Likewise, in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) the court rejected as nonjusticiable because without merit a challenge to Rule 6C of the Delegate Selection Rules for the 1984 Democratic National Convention.

This constitutional line of cases about delegates to *national* party conventions, that was not before the Court in the separate factual context of *state* conventions in *Morse*, 517 U.S. at 201-202, culminates in the decisions of the Court of Appeals and the three-judge District Court in this case. The Court of Appeals correctly found that "[h]ere, the associational rights of the Democratic National Party are at their zenith." J.S. App. 56a.

That three-judge court correctly analyzed and applied all the opinions of this Court in *Morse* to determine whether the state parties were required to seek preclearance before administering DNC rules. It reasoned:

> One of the few guideposts that *Morse* provides for us in this determination is that associational rights must be considered. Indeed, all nine justices in *Morse* recognized that the First Amendment right of association is

implicated by the application of the Act to political parties.

* * *

Thus while the five minority opinions of *Morse* differ as to the implication of the right of association on the facts of that case, all agree that application of the preclearance requirements to political party actions implicates those rights. [J.S. App. 11.]

It held:

But while the Act is unarguably a statute of importance, (citation omitted), it should not be read to extend coverage that would interfere with core associational rights; specifically here, internal national party rules as followed by state parties in a covered jurisdiction.

In reaching this conclusion, we are guided by the principle that we should construe statutes so as to avoid constitutional questions. To hold as LaRouche seeks would unnecessarily implicate First Amendment rights.

* * *

[W]e only consider a national party rule concerning core associational freedoms formulated by an uncovered entity, which does not implicate suspect classifications, and which is administered without alteration by covered jurisdictions. Heeding Justice Breyer's concerns in *Morse*, we need not go further. *See Morse*, 517 U.S. at 238-40 (Breyer, J.).

J.S. App. 14a, 15a.

This holding is so clearly correct as to need no further briefing or argument. It is amply supported by the geographical limits of the statute and by the national party authority exemption to the Department of Justice regulations,

28 C.F.R. § 51.7(b)(1996), that LaRouche concedes are entitled to "deference." J.S. 29.[16]

CONCLUSION

For the foregoing reasons, the Court should summarily affirm the judgment of dismissal by the court below.

Respectfully submitted,

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[16] Nothing that this Court might say in *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3478 (Jan. 21, 2000) (No. 99-401), short of a wholesale repudiation of the First Amendment doctrine that political parties have associational rights, could effect the outcome here. Moreover, even such an extreme departure from *stare decisis* principles would not enable LaRouche to prevail in this appeal because the statutory language of Section 5 and the Attorney General's authoritative regulations are determinative.

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